

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment of the Commission's Regulatory)
Policies to Allow Non-U.S.-Licensed Space)
Stations to Provide Domestic and International)
Satellite Services In the United States)
)
and)
)
Amendment of Section 25.131 of the)
Commission's Rules and Regulations to)
Eliminate the Licensing Requirement for)
Certain International Receive-Only Earth)
Stations)
)
and)
)
COMMUNICATIONS SATELLITE)
CORPORATION)
Request for Waiver of Section 25.131(j)(1))
of the Commission's Rules as it Applies to)
Services Provided via the Intelsat K Satellite)

IB Docket No. 96-111

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FEDERAL COMMUNICATIONS COMMISSION
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File No. ISP-92-007

To: The Commission

REPLY COMMENTS OF COLUMBIA COMMUNICATIONS CORPORATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby replies to initial comments filed on July 15, 1996 concerning the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding. The NPRM has produced a wide range of comments from diverse segments of the satellite industry, some wholeheartedly endorsing the Commission's initiative and others criticizing it as vague or unnecessary. Because the Commission already has before it this

extensive volume of discussion on the issues implicated by this proceeding, Columbia limits its reply to a few key points:

1. It Is Critically Important That The Commission Not Impose Redundant Licensing Obligations Upon Non-U.S. Systems.

Most parties filing comments in this proceeding urge the Commission to live up to its initial determination that re-licensing of systems authorized by other countries would be inappropriate.^{1/} Attempts to examine legal or financial qualifications of the non-U.S. satellite systems themselves would be inconsistent with the Commission's decision not to relicense.

The substantial majority of commenters also concur that applying an ECO-Sat test in the context of individual Earth station applications is an appropriate and unobtrusive means of furthering the public interest in establishing a globally competitive satellite services industry.^{2/} Those that suggest modifications to this approach do not offer changes that undermine the fundamental underpinnings of the Commission's proposal. For example, several commenters assert that requiring Earth station applicants to provide detailed information on market access in foreign countries would pose an undue burden on what are typically small businesses.^{3/} Some of the same parties, however, suggest that the non-U.S. systems themselves should be given the option of providing this information to the FCC outside the Earth station application process.

^{1/} See, e.g., HBO Comments at 11-12; Lockheed Martin Comments at 5-6; Orion Comments at 4; Teledesic Comments at 2; TRW Comments at 8-10.

^{2/} See, e.g., AT&T Comments at 8; DirecTV/Hughes Comments at 10-11; HBO Comments at 9-11; Lockheed Martin Comments at 4-5; TRW Comments at 7-8; MCI Comments at 4.

^{3/} See Keystone Comments at 2-3; Network Comments at 20-21; Worldcom Comments at 7-8.

Columbia believes, as a practical matter, that satellite operators will be more than willing to provide information concerning relevant markets as a means of broadening their access to the U.S. market. Accordingly, it is appropriate for the Commission to permit non-U.S.-licensed satellite operators voluntarily to provide a separate certification regarding market access as part of a Title III Earth station application submitted by another entity.^{4/} Alternatively, as proposed by the networks and others, this demonstration could be made through a request for a Commission declaratory ruling filed by the satellite operator.^{5/} Once the openness of particular markets has been established, by whatever means, the individual Earth station applicant could simply rely on this precedent rather than submitting an entirely new, fully documented exhibit.^{6/}

In addition, Columbia agrees with AT&T that FCC Public Notices concerning Earth station applications have not consistently provided adequate information concerning the operation

^{4/} Given the fact that this information can most logically be provided by the non-U.S. satellite operators themselves, there is no point in imposing artificial reporting requirements on U.S. licensees regarding the markets to which they are able to provide various services. See Columbia Comments at 17; ICO Comments at 22-23; Lockheed Martin Comments at 8 n.9; Orion Comments at 10-12; PanAmSat Comments at 3-4; TRW Comments at 28-29.

^{5/} See Network Comments at 21; AT&T Comments at 8-9; Comsat Comments at 33-35; HBO Comments at 11.

^{6/} Although Columbia does not believe that the Commission should revisit authorizations granted under its flawed pre-ECO-Sat approach to analyzing Earth station applications requesting access to non-U.S. satellites, it certainly should not permit these prior rulings to be given precedential weight under the more fully developed test now proposed. Cf. JSAT Comments at 3-4. Specifically, the International Bureau's finding in Vision Accomplished, 11 FCC Rcd 3716 (Int'l Bur. 1995), should carry no weight as evidence of the existence of effective competitive opportunities in the Japanese satellite marketplace, and new applicants (or JSAT itself) should be required to make a full public interest showing under the new ECO-Sat analysis. The same approach is appropriate with respect to the Russian market. Cf. IDB Worldcom, Inc., 10 FCC Rcd 7278 (Int'l Bur. 1995).

proposed, including insufficient detail concerning the satellites to be accessed.^{7/} As part of this proceeding, and in order to ensure that all interested parties have adequate notice and opportunity to comment upon applications, the Commission should take steps to expand the information included in its Earth station Public Notices so that they accurately describe all satellite facilities that the applicant seeks to access. Perhaps applicants desiring to communicate with non-U.S.-licensed facilities could be listed on a Public Notice separate from those applicants seeking only "ALSAT" designation to communicate with U.S.-licensed spacecraft.

2. The Commission Should Fully Consider The Comments Submitted In This Proceeding Pending The Outcome Of The WTO GBT Negotiations, And Should Carefully Monitor Actions Taken By Other Administrations During The Course Of Negotiations.

A significant number of parties suggest that adoption of a final order in this proceeding should be deferred pending the outcome of the negotiations of the World Trade Organization ("WTO") Group on Basic Telecommunications ("GBT"), now scheduled to conclude late next winter.^{8/} Such an approach is probably prudent. Nonetheless, the Commission should continue to evaluate the comments that it has already received and prepare to issue either a Report and Order or call for further comments, whichever is appropriate, immediately following the conclusion of the GBT negotiations.

Moreover, the Commission, as well as the U.S. Government agencies directly involved in the WTO GBT negotiations, should proceed with caution and ensure that any accord reached as a result of these talks is premised on ***genuine market opening commitments by a sufficient number of participating nations***. Parties in the process of negotiating trade agreements

^{7/} See AT&T Comments at 9-10.

^{8/} See, e.g., AirTouch Comments at 8-10; GE Americom Comments at 5-8; Lockheed Martin Comments at 3-4; L/Q Licensee Comments at 9-11; Motorola Comments at 13-14.

may take actions that are fundamentally inconsistent with liberalizing concessions they have offered. For example, in early 1992, in the midst of negotiations among the United States, Canada and Mexico that led to the North American Free Trade Agreement ("NAFTA"), the Canadian government extended the international satellite monopoly of Teleglobe for an additional five years,^{9/} an action that was inconsistent with the trade principles ultimately embodied in NAFTA. This kind of inconsistent action should not be tolerated in the current trade talks or in future bilateral or multilateral agreements. The Commission must also recognize that certain countries with satellite capabilities (*e.g.*, Russia) are not members of the WTO, and this must be addressed separately regardless of the outcome of the GBT talks.

3. The Commission's Standard Should Be Flexible, Allowing Each Applicant To Demonstrate That Either Form Of The ECO-Sat Test Is Applicable To Its Application; But No Applicant Should Be Exempt From Making A Full ECO-Sat Showing.

In the NPRM, the Commission proposed two different forms of the ECO-Sat analysis — a market-by-market approach evaluating both the "home" market of the non-U.S.-licensed system and the various route markets to be served, and a "critical mass" test evaluating the aggregate impact of market access across a number of markets. The Commission viewed the first of these approaches as appropriate for fixed-satellite service systems, and the latter as more useful in the mobile-satellite sector.^{10/} As many parties have pointed out, however, it may be more

^{9/} See Robert Gibbens, "Teleglobe Monopoly Extended," The Financial Times, March 20, 1992, at 27.

^{10/} See NPRM at ¶¶ 44-47.

appropriate to avoid rigid application of a particular test to a particular service category — giving each applicant the latitude to demonstrate which test is appropriate for its proposal.^{11/}

Regardless of which test is applied, no class of applicants should be exempt, based on its service offerings, coverage area or country of license, from making one of the basic ECO-Sat showings. Some parties have creatively sought to carve out narrow exceptions based on these criteria to shield some applicants from ECO-Sat scrutiny. None of these commenters, however, has articulated a sound reason for categorically excluding some types of applications from the ECO-Sat analysis.^{12/} Similarly, given the important public interest basis for adoption of the ECO-Sat test, it should be applied to all pending applications filed since the initiation of the DISCO I proceeding in April 1995 that have not yet been granted, as well as to all future applications^{13/} — including those that seek to modify existing authorizations.

On the other hand, there are some concerns raised by commenters that could appropriately be considered as part of the broader public interest analysis in the context of individual applications. For example, the television networks (ABC, CBS, NBC and Turner) argue that a market analysis should not apply at all to fixed-satellite services used for international video

^{11/} See Columbia Comments at 14; Lockheed Martin Comments at 9-10; MCI Comments at 12; TRW Comments at 26.

^{12/} The most strained effort of this type is Transworld's suggestion that all Russian satellites be excluded from an ECO-Sat market analysis based upon both the history of U.S.-Russian cooperation in space exploration (including the current presence of a U.S. astronaut on board the Mir space station) and the "conversion" of Russian military satellites to civilian commercial uses. See Transworld Comments at 5. These considerations are simply not relevant to an analysis of competitive opportunities, and are so unabashedly self-serving as to be of dubious validity to an overall public interest evaluation.

^{13/} See AlphaStar Comments at 3; Columbia Comments at 9-11; DirecTV/Hughes Comments at 19; MCI Comments at 5-6. *Contra* Transworld Comments at 4-5.

programming^{14/} or, at least, should not be applied in circumstances where there is no alternative capacity available.^{15/} The networks' concern is that their ability to cover news events around the world would be hindered.^{16/}

While the networks' desire to retain maximum flexibility in choosing satellite facilities is significant, it does not warrant a general exemption from the ECO-Sat analysis (or, for that matter, from any of the ordinary Earth station application procedures). Instead, regardless of what the ECO-Sat analysis itself reveals, the needs expressed by the networks would be appropriately addressed as part of the general public interest inquiry of which the ECO-Sat test is a part.^{17/} Similarly, pre-existing trade agreements involving the United States and other nations could be a factor for consideration within the ECO-Sat framework or as part of the general public interest inquiry.^{18/}

4. There Is Broad Agreement That The Satellite Capacity Of The Intergovernmental Satellite Organizations Should Not Be Used For Domestic U.S. Services Until The Issues Of Their Future Structure And Privatization Have Been Resolved.

Commenters overwhelmingly oppose permitting inter-governmental satellite organization ("IGO") space segment resources to be used to provide domestic U.S. service absent

^{14/} Comments of Capital Cities/ABC *et al.* at 13.

^{15/} *Id.* at 16-17.

^{16/} *Id.* at 13.

^{17/} See NPRM at ¶ 48 ("Once we have applied the ECO-Sat test, we propose to examine other factors that bear on whether grant of the application is in the public interest ..."). Of course, in emergency circumstances, there are existing FCC procedures which would allow short-term use of facilities to meet an urgent, specifically-defined need.

^{18/} See, e.g., Charter Comments at 5-6 (referencing the recent bilateral agreement with Mexico on satellite issues).

complete restructuring and genuine privatization of these entities.^{19/} In addition, there is strong opposition to allowing IGO affiliates to provide service within the U.S. without a showing that they lack the ability to exploit the IGO's substantial market advantages. Only the IGOs themselves, as well as Comsat and ICO, express a contrary view, and these commenters have presented no sound reasons for precipitously permitting core Intelsat and Inmarsat space segment to be converted to primarily non-treaty purposes. Before such operational changes are allowed, the IGOs must undergo significant structural changes in order to prevent them from exploiting their unique status and immense global market power to distort competition in the satellite marketplace.

Comsat and Intelsat, in particular, attempt to obscure this issue by asserting that it is appropriate to "examine the public interest benefits that would arise from the entry of an additional facilities-based competitor into the U.S. market."^{20/} This argument is wholly misplaced because it focuses narrowly on the competitive circumstances within the U.S. market alone. As the Commission's initiatives in DISCO I and DISCO II make abundantly clear, however, the satellite services industry cannot be viewed as anything other than a global marketplace where barriers in one part of the world can have adverse consequences all over the world.

There is no question that the U.S. market is already fully competitive. Incremental increases in available capacity and the addition of another competitor thus will not produce a substantial benefit to satellite users over the *status quo*.^{21/} Conversely, allowing Intelsat and

^{19/} See AT&T Comments at 14-17; Columbia Comments at 21-22; GE Americom Comments at 10-12; HBO Comments at 20-21; JSAT Comments at 6; Lockheed Martin Comments at 13-14; Orion Comments at 12-16; PanAmSat Comments at 6.

^{20/} See Comsat Comments at 7.

^{21/} Comsat's bold assertion that "competition can only thrive once Comsat provides domestic service via Intelsat and Inmarsat" (Comsat Comments at 15) is not only absurd on its face, it is also contradicted by Comsat's assertion that it has relatively little capacity to offer in
(continued...)

Inmarsat to add U.S. domestic service would give these organizations and their signatories additional leverage and expanded capability to package this service with the full range of their international services in ways that could significantly distort the global market. The reason for adopting an ECO-Sat test in the first place is to foster open markets on a global basis, extending to other parts of the world the benefits of vigorous competition that are already enjoyed in the U.S. It is not credible to suggest that unrestricted use of Intelsat and Inmarsat capacity for U.S. domestic service would serve the public interest simply because it would increase the space segment capacity available *for the U.S. market*, particularly when the IGOs have a demonstrated capability to use market power to stifle competition.

Both Comsat and Intelsat also suggest that limiting U.S. domestic service from Intelsat satellites would have little positive impact in dismantling market barriers abroad because “an IGO does not control (and, therefore, must not be held responsible for) the domestic policies of its sovereign members”^{22/} and because the small amount of unused Intelsat capacity available for U.S. domestic use would be insufficient in terms of potential revenues to influence the conduct of an IGO’s foreign Signatories.^{23/} In essence, this argument implies that attempts to influence the behavior of IGO Signatories ultimately would be futile, so that it is appropriate for the Commission to abandon any attempt to secure beneficial changes via regulation or negotiation.

In fact, these arguments demonstrate that the issue of expanded service offerings by IGOs cannot be separated from the issues surrounding the present and future structure of these entities. If, for example, the individual Signatories in Intelsat (many of which are PTTs or affiliates

^{21/}(...continued)

the domestic U.S. market. See Comsat Comments at 17.

^{22/} See Intelsat Comments at 9.

^{23/} See Comsat Comments at 5.

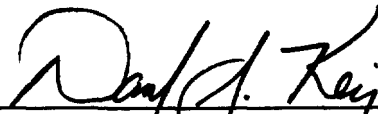
of PTTs) cannot be influenced by a U.S. ECO-Sat policy, then further consideration must be given to possible steps that would promote market opening reforms by Intelsat's "sovereign members" before Intelsat and Inmarsat are permitted to expand their service offerings.^{24/} In view of the complexity of these issues, the Commission should consider deferring further action on this aspect of the DISCO II NPRM until after the restructuring and/or privatization of the IGOs is completed, perhaps in a separately initiated proceeding, as Orion proposes.^{25/}

III. CONCLUSION

For the foregoing reasons, Columbia urges the Commission to adopt the broad framework proposed in the NPRM with the modifications and clarifications proposed by Columbia herein and in its initial Comments in this docket.

Respectfully submitted,

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